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IN THE UTAH SUPREME COURT

CURTIS S. BRAMBLE, in his capacity as a Senator for the State of Utah; STEPHEN H. URQUHART, in his capacity as a House Representative for the State of Utah; BRENDA LARNER, an individual; LAURA JOHNSON, an individual; PEGGY MACIEL, an individual; and PARENTS FOR CHOICE IN EDUCATION, INC., a Utah corporation, Petitioners, vs. OFFICE OF LEGISLATIVE RESEARCH & GENERAL COUNSEL, a government entity; and GARY R. HERBERT, in his capacity as Lieutenant Governor of the State of Utah, Respondents.	**RESPONSE TO PETITION FOR REVIEW OF BALLOT TITLE ON HB 148 AND/OR FOR AN EXTRAORDINARY WRIT; AND FOR EMERGENCY RELIEF STAYING DEADLINE FOR SUBMISSION OF ARGUMENTS ON REFERENDUM** Supreme Court No. 20070407-SC

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Respondent Gary R. Herbert, in his capacity as Lieutenant Governor of the State of Utah (hereinafter "Herbert" or "Lieutenant Governor"), through his attorney, Thom D. Roberts, Assistant Utah Attorney General, hereby files his Response to Petition for Review of Ballot Title on HB 148 and/or for an Extraordinary Writ; and for Emergency Relief Staying Deadline for Submission of Arguments on Referendum:

INTRODUCTION

This action grows out of the fight over educational vouchers, providing scholarship assistance to parents who place their children in private schools. The Utah Legislature adopted HB 148, "Education Vouchers," creating an education voucher/education scholarship program in the 2007 legislative session. Opponents to HB 148 ("Sponsors") filed a referendum petition to require HB 148 to be put to a vote of the people prior to it becoming effective. The Sponsors gathered sufficient signatures to place the matter on the ballot.

After HB 148 was passed and signed by the Governor, the Legislature adopted HB 174, "Educational Voucher Amendments." This Petition raises issues concerning the referendum proceedings regarding HB 148.

POINT I: THE LIEUTENANT GOVERNOR HAS LIMITED INVOLVEMENT IN THESE PROCEEDINGS

The Lieutenant Governor is the chief election officer of the State of Utah. Utah Code Ann. § 67-1a-2(1)(c).[1] As chief election officer he has general supervisory authority over all elections and direct authority over the conduct of statewide referenda such as involved here.

[1] All Utah Code references are to be Utah Code Ann. (2007).

Section 67-1a-(2)(a)(i) and (ii). His specific duties regarding statewide referenda are set forth in § 20A-7-301 to 312.

As concern these proceedings the Lieutenant Governor's involvement is limited. Some issues involve duties that are given to others. For example, preparation of the ballot title is done by the Office of Legislative Research and General Counsel. Utah Code § 20A-7-308(2). The Lieutenant Governor's duties are limited to forwarding that ballot title on and certifying to the county or one approved by the Supreme Court. Section 20A-7-308(3) and (4). Other issues, such as the interrelation of House Bills 148 and 174 and argued extensively by Petitioners, are not "election issues" for the Lieutenant Governor. Finally, those duties of the Lieutenant Governor with respect to the referenda process are generally held to the ministerial. Gallivan v. Walker, 2002 UT 73, ¶ 3, 54 P.3d 1066.

The legal voters of the State of Utah have a right to require any law passed by the Legislature to be submitted to the voters prior to it taking effect. Utah Constitution art. VI § 1(2). The Lieutenant Governor, along with the courts, are obligated to liberally construe the election laws to carry out this intent. Utah Code § 20A-1-401. The Lieutenant Governor is thus obligated to place a statewide referendum on the ballot if the constitutional and statutory provisions are met.

POINT II: JURISDICTION AND STANDING OF PETITIONERS

Petitioners state two separate and alternative grounds on which the Court may hear this Petition. Each will be addressed in turn.

A. CHALLENGE UNDER THE ELECTION CODE

Petitioners base much of their Petition on the referendum ballot title prepared by the Office of Legislative Research and General Counsel pursuant to Utah Code § 20A-7-308(2). That statute allows for a challenge to the wording of the ballot title to be brought by "at least three of the sponsors" of the petition. Section 20A-7-308(4). Petitioners are not sponsors of the referendum and thus do not qualify under that statutory provision. Petitioners claim an entitlement under two theories, neither of which is sufficient to give them authority under the statute.

First, Petitioners claim that since the statute may allow other parties to "participate" in a ballot title challenge they should be allowed to bring a challenge. However, the statute merely allows the Supreme Court to direct the Lieutenant Governor to send notice of the appeal to persons or groups who have filed an argument for or against the measure or to political issues committees which have requested notice, which none of Petitioners are.[2] However, being entitled to notice of an appeal is not the same as being entitled to initiate an appeal. Ballot title review proceedings are creatures of statute. Sizemore v. Meyers, 957 P.2d 577, 579 (Oregon 1998).

Petitioners' second basis is that since a majority of the sponsors of a referendum may challenge the wording of the ballot title, it would be a denial of the equal protection clause to not allow anyone else to challenge the wording. In The Manner Of The Ballot Title For Initiative

[2]Parents for Choice and Education Inc. (PCE) claim that it has "affiliated political issues committee" which entitled them to file the notice. Affidavit of Douglas D. Holmes, ¶ 6, Petitioners' Add. (t).

333, 558 P.2d 248 (Wash. 1977). However, this misapprehends the nature and purposes of these review provisions.

In order for the referendum provisions to come in to play, the Utah Legislature must have passed a Bill. If the Lieutenant Governor certifies that the sponsors obtained sufficient signatures (10% of the cumulative total of all votes cast for all candidates for Governor at the last election statewide and in at least 15 of the state's counties, Utah Code § 20A-7-301(1)), the Office of Legislative Research and General Counsel prepares a ballot title. Section 20A-7-308. The Office of Legislative Research and General Counsel provides legal advice and acts as legal counsel to the Legislature, its members and staff. Utah Code § 36-12-12(2) and art. VI § 32, Utah Constitution.

Concerning who may challenge the wording of the ballot title, the Legislature has only provided for a challenge by at least "three of the sponsors of the petition." Utah Code § 20A-7-38. A referendum petition requires at least five sponsors, § 20A-7-302(2), so this provision only allows for a majority (3 of 5) of sponsors to challenge the wording. It thus excludes only one or two sponsors from challenging the wording. The Legislature provided for no such similar ability to challenge the wording to anyone else. That structure corresponds to the conclusion that it would be unlikely for any supporters of the legislation, including legislators, to believe that the ballot title, as prepared by the lawyer for the Legislature that adopted the provision, failed to "summarize the contents of the measure," which is the standard under the statute. Section 20A-7-308(2)(a)(ii).

This limitation on challenging the ballot title on statewide initiative appears intentional. In the 2007 legislative session, the Legislature amended the ballot title challenge provisions with

regard to a local referenda in SB 197. First, the Legislature allowed for comment to the proposed ballot title by the sponsors of the referendum and the local legislative body. Section 20A-7-608(4). Concerning an appeal to this Court, the Legislature allowed for a challenge to the ballot title wording by either "at least three sponsors of the referendum petitioner" or by a "majority of the local legislative body." Section 20A-7-608(6).

Since the sponsors of a referendum are seeking to overturn a legislative enactment, and since the ballot title is prepared by the legislature's counsel, the sponsors are in a unique position to need or want to challenge what they feel to be an inappropriate ballot title. The federal equal protection provision and the state uniform operation of laws provisions:

> Embody the same general principal: persons similarly situated should be treated similarly, and persons in different circumstances who should not be treated as if their circumstances were the same.

Gallivan v. Walker, 2002 UT 89, ¶ 31, 54 P.3d 1069. The sponsors of a referendum petition, challenging the ballot title drafted by counsel for the Legislature that adopted it, are not "similarly situated" with the individuals who favor the legislation and the legislature. If counsel for the legislature fail to prepare an "impartial ballot title to the referendum summarizing the contents of the measure," it would probably be partial toward the legislative enactment.

The Legislature also chose to only allow a majority of the sponsors to bring a challenge, not individual sponsors or individuals or groups opposed to the legislative enactment. Individuals, and even groups of individuals, in support of the legislation (i.e. those opposed to the referendum) are not similarly situated to a majority of the sponsors such that the constitution mandates their ability to challenge the ballot title wording.

The Utah statutory procedures do not treat similarly situated individuals or groups differently nor differently situated groups the same. Therefore, this limited right of review does not violate the equal protection clause of the federal constitutional or the uniform operation clause of the Utah constitution. Those constitutional provisions do not mandate that these petitioners be allowed to challenge the ballot title wording under the election statutes.

B. PROCEEDING BY WAY OF EXTRAORDINARY WRIT

As an alternative, Petitioners seek to proceed under this Court's extraordinary writ authority, citing to Utah Constitution art. VIII, § 3, Utah R. of Civ. P. 65B, and Utah R. of App. P. 19. A request for a writ invokes the discretion of the court. Cope v. Toronto, 332 P.2d 977, 980 (Utah 1958).

Petitioners seek to bring this action either under the provisions of Utah R. of Civ. P. 65B(c) or (d). Under Rule 65B(c) the ground for relief is that "a public official has 'unlawfully' exercised the authority of their office." Walker v. Weber County, 973 P.2d 927, 929 (Utah 1998). Under Rule 65B(d) the public official has "failed to perform an act required by law as a duty of office, trust or station." As stated in Walker, 973 P.2d at 929:

> [W]e review the alleged failure of governmental officials to perform their duties under an abuse of discretion standard. In other words, we determine only whether the officials have so exercised their discretion that it can be said that they have failed to do what the statute required, or have done something which the statute does not permit.

Petitioners have brought a wide ranging claim for relief. However, under the extraordinary writ, they must point to an action taken by a government official, here either the Office of Legislative Research and General Counsel or the Lieutenant Governor, that entitles them to relief. In addition, any relief granted directing the public official must be concerning

duties imposed on them by statute or constitution. Cope v. Toronto, 332 P.2d at 978-9 (requiring Secretary of State to notify clerks to remove certified initiative from ballot not among the duties and authority of Secretary of State and extraordinary writ will not so require).

POINT III: STATEMENT OF FACTS AND THE REFERENDUM PROCESS

Lieutenant Governor in general has no objection to the statement of facts and referenda process as set forth in the Petition for Review and its supporting Memorandum. The Lieutenant Governor does question two areas, which will each be addressed in turn.

A. THE "TAKE EFFECT" PROVISIONS OF UTAH CODE § 20A-7-102(2) AND 301(2).

In their discussion of the referendum process, petitioners claim that "only laws that will 'take effect' are subject to the referendum process." Memorandum, ¶ 21. Petitioners cite to Utah Codes § 20A-7-102(2) and 301(2). This misstates the purpose, intent, and meaning of those sections and Petitioners' arguments based thereon are misplaced.

Utah Code § 20A-7-102 is the general statutory provision concerning referenda authority and its restrictions. The cited section indicates that by following the procedures and requirements of the election code, voters may:

> require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be referred to the voters for their approval or rejection before the law takes effect[.]

Rather than being a positive statement that creates a standard of laws that are subject to referendum and laws that "take effect," the statute rather follows the constitution in stating that the voters by referenda can require any law to be put to the vote of the people before it takes

effect. It is this provision that stays a law passed by the Legislature and keeps it from going into effect; it is not a standard of what can be the subject of a referendum.

The other cited use of that phrase is of similar import:

> When a referenda petition has been declared sufficient, the law that is the subject of the petition does not take effect unless and until it is approved by a vote of the people at a regular or general election or statewide special election.

Utah Code § 20A-7-301(2). Again, rather than being a definitional standard for which of those laws that have been passed by the Legislature may be the subject of referendum, this provision enforces the constitutional requirement that the people be allowed a vote prior to the law taking effect. On the other hand, those sections do contain the standard for what laws can be the subject of a referendum: "Any law passed by the Legislature," § 20A-7-102(2), or "a law passed by the Legislature," § 20A-7-301(1)(a).

B. THE INTERRELATION OF HB 148 AND HB 174 AND THE EFFECT OF HB 174.

Petitioners' challenges to the referendum process involving HB 148 are based on HB 174. HB 174 was passed in the same legislative session as HB 148, but after HB 148 had been signed by the Governor. Petitioners assert that HB 174 is an independent bill, that it made substantive changes to HB 148, and in essence "repealed" some of the provisions of 148. Memorandum, ¶¶ 4-10. As indicated above, this is not an issue directed to the Lieutenant Governor as the Chief Election Officer. However, without adopting or arguing for or against such a position, the Lieutenant Governor feels compelled to inform the Court that there are arguments contrary Petitioners' position.

Petitioners claim that HB 174 substantively reenacted the provisions of HB 148 in addition to modifying them. HB 174 was dealing with the same subject matter: creation of the scholarship program. Utah Code § 20A-7-301(2). Utah Code § 68-3-6 provides:

> The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment.

Under this statutory provision, the provisions of HB 174 might not be a "re enactment" of the provisions of HB 148. Rather, notwithstanding the "is enacted to read" is at the beginning of each section of HB 174, to the extent that HB 174 purports to enact those provisions of HB 148 it may instead be merely a "continuation" and amendment. This may mean that the provisions of HB 174 do not exist separately and apart from HB 148.

Petitioners have argued from and referenced the opinion by Utah Attorney General Mark Shurtleff regarding HB 174 and whether it can stand on its own or have an effect independent of HB 148. *See* Opinion, Petitioners' Addendum Exhibit K. That opinion argues that the issue whether it is possible to give effect to HB 174 without HB 148 is to be resolved by giving effect to the intention of the Legislature, i.e., what was the Legislature's intent? While concluding that HB 174 can stand on its own, the opinion also notes indications of a contrary intent of the Legislature. Those indications included HB 174's title of "Education Voucher Amendments," that Legislative members only voted for HB 174 because of the provisions in the HB 148 (including specifically mediation monies to offset harms to public schools), the lack of definitions and limitations on authority in HB 148, and the lack of funding for HB 174.

It is not the Lieutenant Governor's purpose here to argue or champion either side of the issues concerning the relation between HB 148 and HB 174 or the effect of HB 174. There are

parties willing to argue and raise the other side of Petitioners' issue. In addition, that argument contrary to these Petitioners' position is being raised in other forums. See Salt Lake Tribune article, May 25, 2007, Voucher Options Likely to Lead to Lawsuit. The issue should be resolved in a proceeding where parties on both sides of the issue are able to marshal the evidence and law on their side so that the Court may fully resolve the issue. This case does not currently have that situation.

POINT IV: CHALLENGE TO THE WORDING OF THE BALLOT TITLE

The legislature has tasked the Office of Legislative Research and General Counsel with the obligation to prepare "an impartial ballot title for the referendum summarizing the contents of the measure." Utah Code § 20A-7-308(2)(a)(ii). The Lieutenant Governor's duty with regard to the ballot title is to mail a copy of the ballot title to the sponsors of the petition, § 20A-7-308(3), and certify to the county clerks the ballot title as prepared by the Office of Legislative Research and General Counsel or as modified by the Supreme Court, § 20A-7-309 and § 20A-7-308(4)(d). This is thus not an issue for the Lieutenant Governor. He merely looks forward to any clarification or resolution of what ballot title he should certify to the county clerks.

POINT V: THE COURT SHOULD NOT ENJOIN THIS REFERENDUM FROM PROCEEDING TO A VOTE

Petitioners seek an order from this Court enjoining the referendum from going forward to its scheduled vote in November. This is based on the claim that the referendum petition which was circulated by the sponsors failed to correctly identify the law on which the referendum was sought. However, the sponsors complied with the requirements of the referendum provisions and

are entitled to a vote. In addition, the Court lacks the authority as claimed by the Petitioners to issue the injunction. Finally, Petitioners' claim is untimely.

Utah Constitutional art. VI, § 1 vests the legislative power of the State of Utah in the people to be exercised through their powers of initiatives and referenda. Concerning that right, this Court has stated:

> Because the people's right to directly legislate through initiative and referendum is sacrosanct and a fundamental right, Utah courts must defend it against encroachment and maintain it inviolate. *See* Cope v. Toronto, 8 UT 2d 255, 259, 332 P.2d 977, 979 (1958) (per curiam) (noting that statute enabling people's right to initiative must be given construction that "effectuates its purpose that the people be permitted to vote and express their will on proposed legislation"); *See* also Legislature v. Eu, 54 Cal. 3d 492, 816 P.2d 1309, 1313, 286 Cal. Rptr. 283 (Cal. 1991) (en banc) ("It is our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise.");

Gallivan v. Walker, 2002 UT 89, ¶ 27, 54 P.3d 1069. The Legislature has the duty to enact legislation that implements and enables the people's right to initiatives and referenda and may not do so in a manner that unduly burdens or diminishes the people's right to referenda. Gallivan, 2002 UT 89, ¶ 28.

Persons desiring to circulate a referendum petition file an application with the Lieutenant Governor within five days of the end of the legislative session. The application must be made by at least five sponsors and must include a copy of "the law" that they wish to have voted on by the people. Section 20A-7-302. The form for the referendum petition is set forth in § 20A-7-303. The referendum petition is also required to have attached a copy of the "the law" that is the subject of the referendum. Section 20A-7-303(1)(b). Referendum packets, consisting of the referendum petition and signature sheets, are then circulated by the sponsors. Sections 20A-7-304 and 305. Within 40 days of the end of the session the referendum packets are submitted to

the county clerks who check the verifications of the circulators and the names of the signers, certifying those who are registered voters within 55 days of the end of the session. Section 20A-7-306.

The county clerks then forward the referendum packets to the Lieutenant Governor. His duties are then limited to counting the number of names certified by the county clerks from the signature sheets and declaring whether there are sufficient or insufficient signatures on the packets. Section 20A-7-307. The duties of the Lieutenant Governor at this point are ministerial, Gallivan, 2002 UT 73, ¶ 3, and he must complete his count and certification no later than 60 days after the end of the session. If sufficient signatures are gathered the law does not go into effect until after a vote of the people, § 20A-7-102(2), and the Governor sets the date for the election. Section 20A-1-203(3).

On March 1, 2007 the Sponsors filed an application with the Lieutenant Governor to circulate a referendum petition on HB 148. *See* Petitioner's Addendum, Add. G. At that time, HB 148 was a "law passed by the legislature" and thus subject to referendum. HB 174 was also a law "passed by the legislature" but was not subject to referendum, having been passed by a two-thirds majority. Utah Code § 20A-7-102(2). However, HB 174 was not in force or effect and thus had not modified or superceded HB 148. Rather, it was a Bill that had been passed which may or may not become law and which may or may not have an effect on HB 148. Petitioners' argument that the mere passage of HB 174 altered, amended, repealed or had any other immediate effect on HB 148 is in error.

It is Petitioners' argument that the Sponsors' right to a referendum on HB 148 is limited to the provisions of HB 148 as modified by some later event or activity, i.e., HB 174. That

claimed later activity and event is Petitioners' interpretation of the interrelation of HB 148 and HB 174 and the effect of HB 174 on HB 148. As stated elsewhere, this is not the Lieutenant Governor's argument.

Petitioners also argue that a repealed statute or ordinance need not be the subject of a referendum vote, to Kiegley v. Bench, 63 P.2d 262 (Utah 1936), and that HB 174 has in effect repealed portions of HB 148. However, Kiegley was based upon the courts not requiring the clerk to conduct an election on a repealed law because the court would not require the doing of a useless act as nothing could be accomplished by holding a referendum election concerning an act which had been repealed. Kiegley, 63 P.2d at 265-6. Here, HB 148 has not been repealed and the Lieutenant Governor has not refused to certify the referendun to the county clerks. And even if the Petitioners' legal theory with regard to the effect of HB 174 on HB 148 is upheld, there are provisions of HB 148 which are separate from and unaffected by HB 174. Enjoining the referendum vote would thus be unwarranted.

It is generally recognized that there are three general areas of challenges to initiatives and referendums: (1) procedural requirements for placing a measure on the ballot; (2) whether the subject matter is appropriate under initiative authority; and (3) if the measure passed would violate the federal or state constitutional provisions or otherwise be invalid. Herbst Gaming Inc. v. Heller, 141 P.3d 1224, 1228 (Nev. 2006). The courts generally allow pre-election challenges to be brought under the first and second areas, but not on the third involving constitutional and other invalidity, Herbst, 141 P.3d at 1229, on justiciability and ripeness claims. The concerns involving the effect of HB 174, as argued by Petitioners, fall generally in to that third area. In Coleman v. Bench, 84 P.2d 412 (Utah 1938) the Defendant recorder refused to process the

request for the initiative to repeal an ordinance on the basis that the existing ordinance a constituted contract and could not be repealed without impairing the obligation of contracts. Id. at 413-14. The Court held that it is not up to the election officer to pass upon or guess as to the constitutionality or invalidity of the proposed initiative or referendum. The Court noted that the officer whose duty to act may be challenged should not base his decision on what the Court might do in any suit against him or with regard to the future validity of the act. The Court therefore directed the officer to proceed with the petition and election regarding repealing the ordinance.

Similarly here, the Lieutenant Governor should not guess or perform his own analysis with regard to future impacts on, interpretations of, or the validity of HB 148. The Sponsors presented the Lieutenant Governor with a petition for a vote by the people on HB 148, a law passed by Legislature. The Lieutenant Governor correctly accepted the application, prepared the referendum petition, and the sponsors obtained the necessary signatures. The matter should proceed to a vote of the people. If the referendum passes, HB 148 will not become law "whatever effect that may have;" if the referendum fails, HB 148 will become law "whatever effect that may have."

Petitioners' cite various cases with regard to the failures of proponents to "correctly identify the law in which proposed referendum is sought." Memorandum, ¶¶ 35-38. However, those cases involved direct misidentifications of the laws that were subject to referendum by including provisions that had not been adopted. For example, in Schultz v. Cuyahoga County Board of Elections, 361 N.E.2d 477, 486 (Ohio Ct. of App. 1976), *aff'd by* 357 N.E.2d 1079, 1081 (Ohio 1976) (per curium), the referendum identified the law being challenged as the full

text of a zoning resolution. However, only three of the four provisions in the resolution actually had been adopted so the referendum purported to include laws that were not adopted. In Hebard v. Bybee, 65 Cal.App. 4th 1331(Cal. App. 1998), the sponsors listed an incorrect ballot title thereby including a supposed zoning change which had not been approved as within the law being put to a vote. Petitioners also cite to cases involving a failure to attach a copy of the law to the petition as required by the law: The failure was thus discussed as a failure to identify the law subject to the referenda. Mervyn's v. Reyes, 69 Cal.App. 4th 93 (1998), Nelson v. Carlson, 17 Cal.App. 4th 732 (1993).

Each of these cases thus involves an incidence where there was a positive misstatement as to the law that was the subject of the referendum. The sponsors had included actions that had not been taken by the legislative body and purported to make them part of law to be the voted on. Such is not the case here. Sponsors identified HB 148 in its entirety as the law to be the subject of the referendum. There is no misstatement of what HB 148 says, no misstatement as to the extent of its provisions, and no failure to attach a copy thereof. This difference in type of failure to identify the law was also noted in Hazel v. Cuyattoga County Bd. of Elections, 685 N.E.2d 224 (Ohio 1997). Thus, Sponsors complied with their duty under the statutes to "attach a copy of the law that is the subject of the referendum." Utah Code § 20A-7-303(1)(b). The Sponsors, as well as the Lieutenant Governor, are not required to guess as to future activities or events that may interact with the Bill.

To the extent that the Petitioners' challenge is to the referendum petition, it would appear to be untimely. As recognized in Petitioners' Memorandum, ¶¶ 23 and 24, the Sponsor submitted their referendum application on March 1, 2007. Further, the Lieutenant Governor

supplied the Sponsors with the referendum petition on March 2. Sponsors thereafter prepared the referendum packets and began circulating the petition and gathering signatures. Those referendum petition packets were all submitted to the county clerks on April 9, 2007 and the county clerks thereafter began submitting the packets to the Lieutenant Governor. On April 30, the Lieutenant Governor certified the petition as sufficient. The present action was commenced on May 24, 2007.

Petitioners' in their Petition recognized that challenges to election processes must be commenced at "the earliest possible opportunity." In re Petition of Merrill Cook, 882 P.2d 656, 659 (Utah 1994), Petition p. 8. Cook involved a challenge to the ballot title and voter information pamphlet which the petitioners had on August 31. The Petitioners delayed bring their action until September 28. In the interim the ballots and voter information pamphlets were sent to the printer and given to the press for distribution, were distributed, and an unknown number of absentee ballots had been cast. The Court therefore held that Petitioners failed to act with reasonable diligence and their challenge was untimely. The Court cited to Clegg v. Bennion, 247 P.2d 614 (Utah 1952) where a candidate waited 32 days after the filing deadline to challenge an opponents timeliness in filing for office. In the meantime, the state conventions had been held, candidates nominated, and campaigns had begun. The Court denied relief on the basis of delay.

Petitioners here could have brought this action concerning the referendum petition in early March rather than waiting until the end of May. In the interim, the referenda Sponsors circulated the petition statewide, engaged in an active campaign and raised sufficient signatures to qualify the referenda. As in Cook and Clegg above, too much has transpired in between when

these Petitioners could have brought their claim and when they actually filed it. Therefore, their claim with regard to the petition is untimely.

Petitioners claim that this Court has the authority to issue the requested injunction based upon Utah Code § 20A-7-307. Memorandum, p.38-9. That argument is misplaced. Section 20A-7-307(3)(c) authorizes this Court to enjoin the Lieutenant Governor and other offices from certifying or printing the ballot title if the petition is not "legally sufficient." However, § 20A-7-307 deals with the ministerial review and counting of the number of signatures by the Lieutenant Governor. Gallivan, 2002 UT 73, ¶ 3. It is not a general grant of authority to the Lieutenant Governor to review the "sufficiency" of the referendum petition or other processes, nor authority to this Court to enter into such an effort. Rather, it is limited to review of the referendum packets and their "legal" sufficiency in terms of the number of signatures.

Gallivan v. Walker, 2002 UT 89, which granted relief on the basis of the unconstitutionality of the multi-county signature requirement, is not contrary. In Gallivan the Lieutenant Governor had determined that the signatures were "insufficient" because the Sponsors had not met the multi-county signature requirement, although they had met the statewide requirements. The Court struck down that multi-county requirement which went directly to the Lieutenant Governor's ministerial duty in determining if sufficient signatures were present. The action requested here, for the Lieutenant Governor or the Court to evaluate the interrelation of and potential impacts of HB 148 and HB 174, is clearly beyond and of a different type of action contemplated in Utah Code § 20A-7-307(3) or in Gallivan.

Similarly, there is no authority under Rule 65B, extraordinary writ, with regard to this action. Petitioners' are required to demonstrate an abuse of discretion by the Lieutenant

Governor in his acting or failing to act under a specific duty. Walker v. Weber County, 973 P.2d at 929. In addition, as this matter is currently set for vote on November 6, 2007, Petitioners must show a duty of the Lieutenant Governor that the Court would order to do to stop the election. Cope, 332 P.2d at 978-79.

The Court should therefore deny the request by the Petitioners to enjoin the referendum proceedings and election.

POINT VI: REQUEST FOR STAY OF DEADLINE FOR SUBMISSION OF ARGUMENTS ON THE REFERENDUM

Petitioners have requested the Court to grant emergency relief and stay the deadlines for submission of arguments for the voter information pamphlet on HB 148. This request was made in order to allow the Court to render an decision in this matter without having to do so prior to June 1, 2007, when those arguments are due. If the Court wants to do that, Lieutenant Governor has no objection.

In the 2002 proceedings involving Gallivan v. Walker, 2002 Utah 89, the Court, in aid of its jurisdiction and to allow for the initiative to be voted on by the people at the election, entered orders and directed the parties to comply with the statutory procedures and duties under the initiative law, notwithstanding that the time for performing those duties had expired. That included such matters as ballot titles, voter information pamphlet, arguments and other duties as similarly requested being made here.

CONCLUSION

Lieutenant Governor has a limited role in these proceedings, based upon the issues involving the duties and responsibilities of other entities and based upon the ministerial nature of

the duties of the Lieutenant Governor. Respondents in this case are public officials who have duties under the initiative and referendum statutes that were adopted by the Legislature to allow the voters of the State of Utah to exercise and enforce their rights to have laws passed by the Legislature submitted to a vote of the people prior to their becoming effective. The Sponsors of the Referendum are not parties to this proceeding.

With regard to the explicit requests of the Petitioners, the Lieutenant Governor asks the Court to allow the scheduled election on the Referendum to go forward on November 6, 2007, and if the Court undertakes the issue of the ballot title, that the Court either accept and allow the ballot title prepared by the Office of Legislative Research and General Counsel or certify to the Lieutenant Governor a ballot title that meets the requirements of § 20A-7-308. With regard to issues involving the interrelations of HB 148 and HB 174 and the effects of HB 174 on HB 148, the Court should allow for the proper resolution of those issues in a proceeding with parties and advocates on both sides of the issue, be that in some other proceeding or in this proceeding through the addition of additional parties. The Court should extend the time for the submission of arguments on the Referendum if the Court thinks that it is needed.

Dated this _____ day of _____May_____, 2007.

MARK L. SHURTLEFF
Attorney General

_____

THOM D. ROBERTS
Assistant Attorney General
Attorney for Respondent Gary R. Herbert

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2006 I mailed a true and exact copy of the foregoing RESPONSE TO PETITION FOR REVIEW OF BALLOT TITLE ON HB 148 AND/OR FOR AN EXTRAORDINARY WRIT; AND FOR EMERGENCY RELIEF STAYING DEADLINE FOR SUBMISSION OF ARGUMENTS ON REFERENDUM to:

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